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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 459

RALPH O. BROWNFIELD, *Petitioner*

v.

TRUMAN H. LANDON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

RALPH O. BROWNFIELD, *Petitioner*

v.

TRUMAN H. LANDON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ralph O. Brownfield, by counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on June 28, 1962.

OPINIONS BELOW

The order of the United States District Court for the District of Columbia (Judge Youngdahl) denying respondent's first motion for summary judgment is reprinted in the Appendix hereto at page 1a. The Memorandum and Order of the District Court (Judge Matthews) granting respondent's second motion for summary judgment are found in the Appendix at page 1a-2a. The Opinion of the Court of Appeals, not yet reported, is reprinted in the Appendix at page 2a-10a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1962 (App., *infra*, p. 2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is or should be an absolute privilege in the Inspector General of the United States Air Force to say within the hearing of others that petitioner "is guilty as hell" and "should wind up in the penitentiary".

2. Assuming that the absolute privilege doctrine of *Barr* v. *Matteo*, 360 U.S. 564, is applicable to such statements, slanderous *per se*, does the record herein present clear, uncontroverted evidence that the slanderous statements were made in connection with actions "within the outer perimeter of [respondent's] line of duty", as required by *Barr* v. *Matteo* and a motion for summary judgment.

STATEMENT

Petitioner, a retired United States Air Force officer, alleged in his complaint that on October 13, 1955, respondent, then Inspector General of the Air Force, told a United States Congressman and a private citizen that, among other things of a slanderous nature, petitioner "is guilty as hell" and "should wind up in the penitentiary" (J.A. 3).*

The Office of the Inspector General had supervision over the then Directorate of the Office of Special Investigations (O.S.I.) (J.A. 20). The O.S.I. had, in

* The Court of Appeals Record, Joint Appendix, is referred to as J.A.

May of 1955, started an investigation of the aforesaid private citizen, petitioner and others on Air Force procurement matters (J.A. 31). The private citizen had been told that in July of 1955 a corporation owned by him which had Air Force contracts had been put on a Debarred Bidders List as a result of the investigation.

On the first of August of 1955, pursuant to an agreement with the Department of Justice, the Department of the Air Force had turned the results of the investigation over to Justice which had elected to assume control of the case and had sent the entire file to the proper United States Attorney (J.A. 32, 125). The U. S. Attorney was told that if he needed to have further investigatory work done he could contact the Judge Advocate General of the Air Force, who would have it done (J.A. 126). Three days after Justice took control, respondent, as Inspector General, received his last report on the case from the O.S.I. (J.A. 97). Furthermore, the Department of the Air Force thereafter referred "all requests for information relative to the matter under investigation . . . to the Department of Justice as the Department of Justice had complete control over the case" (J.A. 33).

On October 13, 1955, the Congressman and the private citizen, without the knowledge of petitioner, met with respondent in his office and sought to have the corporation removed from the Debarred Bidders List (J.A. 63). It is not clear in the record how the conference was scheduled, but it is clear that in this conference the respondent, without provocation, uttered the slanderous remarks about petitioner.

Respondent moved for summary judgment, which motion petitioner opposed on the ground that genuine

issues as to material facts existed. The material reprinted in the Joint Appendix on pages 7 to 33 was before the Court as exhibits attached to the pleadings. Judge Youngdahl, on June 3, 1960, denied the motion on the ground that "there exist material facts which are in dispute, particularly those concerning the circumstances under which the defendant made the alleged defamatory statements" (J.A. 33-34). Thereafter, respondent answered, several depositions were taken and filed, and respondent again moved for summary judgment. Petitioner again opposed the motion on the grounds that Judge Youngdahl's decision was the law of the case and that genuine issues as to material facts still existed. The material printed in the Joint Appendix on pages 34 to 127 had been added to the record but did nothing to resolve the dispute "concerning the circumstances under which the defendant made the alleged defamatory statements". Judge Matthews granted respondent's motion for summary judgment on the authority of *Barr* v. *Matteo, supra; Howard* v. *Lyons,* 360 U.S. 593; and *Gregoire* v. *Biddle,* 177 F.2d 579.

The Court of Appeals affirmed on June 28, 1962, on the authority of *Barr* v. *Matteo* and *Howard* v. *Lyons.*

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. *Barr* v. *Matteo* should be reexamined and overruled or modified.

2. The Court of Appeals has extended the doctrine of absolute privilege beyond the limits set and to a degree not contemplated by this Court in *Barr* v. *Matteo.*

3. The decision below in this case disregarded two well established legal principles.

REASONS FOR GRANTING THE WRIT

I. BARR v. MATTEO SHOULD BE REEXAMINED AND OVERRULED OR MODIFIED.

A. Barr v. Matteo Should be Overruled

In *Barr* v. *Matteo*, the agency, of which Mr. Barr was the acting director, had been under attack by various critics because of the use of a novel plan for the utilization of certain agency funds. In defense, Mr. Barr issued a press release. A jury found it was false and defamatory as to the two persons named in it and awarded them damages. This Court reversed the Court of Appeals and held that Mr. Barr was cloaked with an absolute privilege which rendered the plaintiffs' proven claims for damages useless. That decision was bottomed on the principle "that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties", citing *Gregoire* v. *Biddle, supra.* The only guidelines as to what is *duty* were expressed in the principal opinion of Mr. Justice Harlan, joined in by Justices Frankfurter, Clark and Whittaker, as: "matters committed by law to his control or supervision" (from *Spalding* v. *Vilas*, 161 U.S. 483), and "the action . . . [is] within the outer perimeter of [the government official's] line of duty". Mr. Justice Black concurred in the reversal "for not altogether the same" reasons. Our principal reasons for concluding that that decision merits reexamination by this Court are best set forth in the dissenting opinion filed by Mr. Chief Justice Warren, in which Mr. Justice Douglas joined, and the dissents of Mr. Justice Brennan and Mr. Justice Stewart.

There is another reason, not expressed in the dissenting opinions, why the *Barr* v. *Matteo* doctrine

should be overruled. A principle alien to the ancient cause of action for defamation was used to resolve a defamation issue, thereby causing the clear distinction between *words* and *acts* to be lost, temporarily at least, but certainly during the pendency of the case at bar. *Gregoire* v. *Biddle* involved a suit for false arrest and imprisonment, an *act* of a government official. As noted above, *Barr* v. *Matteo* is fastened to the principle that government officials should be unembarrassed by the fear of suits "in respect of *acts* done in the course" of their duties (Emphasis added). The principal opinion in *Barr* v. *Matteo* speaks of "*action* . . . within the outer perimeter" (Emphasis added). The gravamen of the cause of action for defamation is not that the defendant performed some *act*, but that defendant despoiled the plaintiff's good name and reputation by using certain *words*, either orally or in writing. For example, Mr. Barr may have had the right to issue a press release telling that he would suspend the named individuals but he had no right to use defamatory words; he had no right to castigate. Assuming, *arguendo*, in the instant case, that General Landon was acting within the "outer perimeter" of his duties in discussing petitioner's involvement in the investigation with the Congressman and the private citizen, he had no right to use words which are universally considered to be slanderous *per se*.

The other case upon which the principal opinion in *Barr* relied heavily is *Spalding* v. *Vilas*, *supra*, but as was pointed out by Mr. Justice Brennan in footnote 3 to his dissenting opinion, there is strong doubt that this was a defamation case.

Barr v. *Matteo* may be a proper formula to protect a government officer for his *actions*, i.e., false arrest

and imprisonment, but it is wholly inconsistent with the original legal theory supporting the cause of action for defamation. It should be overruled.

B. If Not Overruled, Barr v. Matteo Should be Modified

In *Barr* v. *Matteo,* the jury had to determine that the words were defamatory. The instant case involves slander *per se.* A jury would have only to decide whether the words were spoken; they would not need to inquire into respondent's motives. Assuming that the *Barr* v. *Matteo* doctrine is correct for a "Barr" type case, it is not correct when the defendant utters words, without provocation, which are slanderous *per se.* If this can be read into the *Barr* v. *Matteo* decision, that decision needs modification. Surely this Court did not mean to abolish a right of redress for a wrong as clearly mischievous as slander *per se.* Surely this Court did not intend to lay down the rule that a military man may with impunity usurp the prerogative of the courts to pronounce a man guilty.

Barr v. *Matteo,* if not overruled, should be modified for another reason—the reason expressed by Mr. Chief Justice Warren—that the standard it sets up is too vague. The principal opinion leaves only confusion as to what is inside and what is outside the "outer perimeter". Mr. Justice Stewart's dissent gives emphasis to this and the Attorney General of the United States recognized immediately that the decision did not give specific guidance on that aspect of the doctrine. In a memorandum issued to all heads of departments two weeks after the Barr decision was handed down, Attorney General Rogers said:

> "As to the extent and limitations of the privilege, although referred to as an 'absolute privilege', it

applies *only* to statements made in the course of the exercise of the duties of the office. The privilege does not apply to defamatory statements unrelated to official duties. Furthermore, there may be a close question as to whether a statement is in the line of duty of the office within the meaning of the decisions. (See dissent by Justice Stewart in the *Barr* case.)"

2. THE COURT OF APPEALS HAS EXTENDED THE DOCTRINE OF ABSOLUTE PRIVILEGE BEYOND THE LIMITS SET AND TO A DEGREE NOT CONTEMPLATED BY THIS COURT IN BARR v. MATTEO.

Respondent was not an "official of policy-making rank". Respondent was not an "agency head, announcing personnel action which he planned to take in reference to charges widely disseminated to the public." His powers, duties and functions were specifically spelled out in Air Force Regulation No. 20-68. (J.A. 19-23). His functions at best were to investigate, report and recommend to his superiors. He had no authority to sit in judgment. He was without power to judge. He had neither duty nor authority to report directly to the public. Inspectors General do not issue press releases. He was without power to discipline, to fire, or to take personnel action affecting petitioner. A determination as to guilt or innocence lay with the courts or a court martial. The application by the Court of Appeals of *Barr* v. *Matteo* and *Howard* v. *Lyons* to the instant case extended the rule of those cases beyond the limits set and to a degree not contemplated by this Court. The Court has obviously extended the privilege to the "title of the office". *Barr* v. *Matteo* expressly disclaimed an intent to do this.

3. THE DECISION BELOW IN THIS CASE DISREGARDED TWO WELL ESTABLISHED LEGAL PRINCIPLES.

A. A genuine issue existed as to the material fact of whether, on October 13, 1955, respondent had any control over the case or supervisory control over the investigation. It may be granted that he did have supervisory control of the investigation from its inception in May of 1955 to August of the same year when jurisdiction and control were transferred to and assumed by the Department of Justice. The "entire matter was referred to the Department of Justice in August of 1955" by the Air Force (J.A. 32). Only respondent and some attorney in the Department of Justice have said to the contrary (J.A. 12, 100). The last report respondent, as Inspector General, received about the case was a memorandum dated 4 August 1955 informing him that the "Air Force was, in agreement with established procedures, referring the matter to the Department of Justice for their consideration" (J.A. 97-99). The opinion below summarily dismissed the argument that genuine issues existed by saying "the whole interview had reference to a matter under the jurisdiction of General Landon"—no rhyme, no reason.

B. When Judge Youngdahl denied the first motion for summary judgment, it established the law of the case. This should not have been overruled by Judge Matthews unless defendant produced evidence sufficiently compelling as to eliminate the issues of fact which Judge Youngdahl had found to exist. Although there was a "different and expanded record", as the Court of Appeals said (App. p. 10a), it is significant that that Court did not bother to point out what it was that was before the second court on the issue of

"outer perimeter" of respondent's duties that was not before the first court and which foreclosed argument as to the existence of an issue.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Date: September 25, 1962

APPENDIX

Order

This cause having come on to be heard on motion of the defendant for summary judgment, after oral argument and for the reason that the Court is of the opinion there exist material facts which are in dispute, particularly those concerning the circumstances under which the defendant made the alleged defamatory statements, it is by the Court this 3rd day of June, 1960,

ORDERED That the motion of the defendant for summary judgment be and the same is hereby denied.

LUTHER W. YOUNGDAHL
Judge

Memorandum

The Court will find for the defendant on the motion for summary judgment. *Barr* v. *Matteo*, 360 U.S. 564; *Howard* v. *Lyons et al.*, 360 U.S. 593; *Gregoire* v. *Biddle et al.*, 177 F.2d 579.

Counsel for defendant will submit a proposed order.

BURNITA SHELTON MATTHEWS
Burnita Shelton Matthews
Judge

November 9, 1961

Entered 11/21/61

Order

This cause having come on for hearing upon the motion of the defendant Truman H. Landon for summary judgment and upon consideration of said motion, the memorandum of points and authorities and affidavits and exhibits in support thereof and in opposition thereto and the certified

records filed in the cause, and upon consideration of the oral arguments of counsel in open court, and it appearing to the Court that there is no genuine issue of material fact and that defendant Truman H. Landon is entitled to summary judgment as a matter of law, it is by the Court this 20 day of November, 1961

ORDERED that the motion of the defendant for summary judgment be and the same hereby is granted.

s/ MATTHEWS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,825

RALPH O. BROWNFIELD, APPELLANT

v.

TRUMAN H. LANDON, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 28, 1962

Mr. Byron N. Scott for appellant. *Mr. Robert D. Scott* also entered an appearance for appellant.

Mr. Daniel A. Rezneck, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Nathan J. Paulson* and *Joseph M. Hannon*, Assistant United States Attorneys, were on the brief, for appellee.

Before WILBUR K. MILLER, Chief Judge, DANAHER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* This is an appeal from a judgment of the District Court which granted summary judgment to the defendant [appellee].

The action in this case sought damages for slander against the defendant, who was serving as Inspector General of the Air Force at the time of the alleged defamation. A brief review of the facts established beyond dispute is necessary to a decision of this case.

Sometime in May 1955 the Office of Special Investigations of the Air Force started an investigation of alleged irregular conduct on the part of certain personnel at the Middletown Air Materiel Area, Olmsted Air Force Base, Pennsylvania. The investigation centered largely around the Royal Electric Company of Dayton, Ohio, and its connection with the plaintiff [appellant] Brownfield, among others. At the time the investigation was initiated, plaintiff was a temporary Brigadier General of the Air Force and vice-commander for Middletown; defendant was a Lieutenant General of the Air Force and, as such, was responsible for the Office of Special Investigations as Inspector General.

Without attempting to go into the many ramifications of the investigation, it is sufficient to state that serious charges were levelled at plaintiff, relating especially to his personal participation in certain business and personal transactions involving a firm known as the Royal Electric Company. Plaintiff was reprimanded and his temporary rank of Brigadier General was terminated on October 1, 1955, at which time he reverted to his permanent rank of Colonel.

Robert E. McNett, head of the Royal Electric Company, contacted Representative Wickersham, a member of Congress from Oklahoma, who knew of the fact that Royal, as well as Brownfield, was charged with irregularities. Wickersham and McNett, as a result of a telephone request from Representative Wickersham, conferred with Lieutenant General Eckert, then Assistant Chief of Staff for Materiel with headquarters in the Pentagan. Wickersham explained that he was acting in his official capacity

and as a member of the House Armed Services Committee. He added that Royal was on the debarred bidders list in connection with the charge against plaintiff, and particularly in connection with a patent which the latter had sold to Royal. General Eckert made an appointment for General Landon to meet with Wickersham and McNett. Whether or not the meeting was requested by Mr. Wickerhsam, Mr. McNett or General Eckert is not clear but that is immaterial, as the appointment was agreeable to both Wickersham and McNett.

Mr. Wickersham, Mr. McNett, General Landon, and a junior officer of the Air Force met on October 13, 1955, at which meeting the slanderous words were allegedly spoken. Although there is not the slightest question that the purpose of the conference was to cause a cancellation of the investigation and a restoration of Royal as an eligible bidder, some question is raised as to who first brought up plaintiff's name. We consider the answer to that question immaterial. The purpose of the conference was to discuss the investigation, the surrounding facts of which were fully known to all parties present. Since the investigation involved improprieties alleged to have arisen in connection with certain business transactions between plaintiff and Royal, it is obvious there could have been no discussion of the investigation without reference to plaintiff's activities, the two being inseparably linked. In other words, silence as to plaintiff's activities would have been equivalent to silence with respect to the investigation. And, from the time Mr. Wickersham first entered the picture until the meeting at which the alleged slander took place, the matter under discussion involved the relationship allegedly existing between Royal and plaintiff. It further appears that, in the course of this conversation, Mr. Wickersham remarked that in his opinion Congress, or one of its committees, could investigate the investigators and that General Landon's investigators were the ones who should be investigated. It was in respond-

ing to this observation concerning the integrity of the investigation that General Landon is alleged to have slandered the plaintiff.

Thereafter, and on September 4, 1959, the present suit was filed seeking damages for the alleged slander. The answer of the defendant admitted conferring with Mr. Wickersham and Mr. McNett but denied that he made the statement attributed to him, pleaded the truth of the words that he did speak, and stated "that any and all actions taken or words spoken in the premises by him were in the course and conduct of his official duties as Inspector General of the United States Air Force and are and were absolutely privileged." It is with this claim of privilege that this opinion will deal.

On November 27, 1959, the defendant filed motion for summary judgment, with accompanying affidavits and exhibits. Opposition and accompanying affidavits were filed by plaintiff. This motion was denied by District Judge Youngdahl on June 3, 1960, on the ground that material facts were in dispute, particularly those concerning the circumstances under which the defendant uttered the alleged slander.

After depositions of McNett, Brownfield, Wickersham, General Eckert, and Colonel N. E. Powel (who was present at the interview in question and who "normally . . . was always present whenever General Landon as Inspector General had an official visitor") had thereafter been taken and further exhibits filed, the defendant "on the basis of further discovery since June 3, 1960," moved the court for summary judgment "for the reason that there now exists no dispute as to the material facts and defendant is entitled to judgment as a matter of law."

In a brief memorandum, the court (Judge Matthews) announced that it found for the defendant. The District Judge relied upon two cases decided by the Supreme Court, *Barr* v. *Matteo*, 360 U.S. 564 (1959), and *Howard*

v. *Lyons*, 360 U.S. 593 (1959); and *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949). Accordingly, on November 21, 1961, the court entered its order granting the motion for summary judgment. This appeal followed.

We think the two Supreme Court cases adequately establish the correctness of the District Court's ruling.

Barr v. *Matteo, supra*, was a libel action, the libel being contained in a press release issued at the direction of the defendant, the Acting Director of the Office of Rent Stabilization, announcing his intention to suspend two subordinate officials because of the part they had played in formulating a plan for the utilization of certain agency funds. Thus, the press release was alleged by the plaintiffs to have defamed them and to have been actuated by malice. After certain intermediate proceedings not here material, this court held[1] that the press release was protected by a *qualified* privilege but that there was evidence from which a jury could reasonably conclude that the defendant [petitioner in the Supreme Court] had acted maliciously or had acted with lack of reasonable grounds for believing that his statement was true, and that either conclusion would defeat the qualified privilege.

The Supreme Court granted certiorari,[2] to determine whether under the circumstances of the case petitioner's claim of *absolute* privilege should have stood as a bar to the maintenance of the suit despite the allegations of malice contained in the complaint. The Supreme Court reversed the judgment of this court holding that petitioner's plea of absolute privilege in defense of the alleged libel should have been sustained. Mr. Justice Harlan, joined by three other members of the Court, rendered an opinion in which he stated:

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[1] 103 U.S. App. D.C. 176, 256 F. 2d 890 (1958).

[2] 358 U.S. 917 (1958).

"It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571.

Following this statement, Mr. Justice Harlan quoted at length from the opinion of Judge Learned Hand in *Gregoire* v. *Biddle, supra*, then continued:

"We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

"To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas, supra*, at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360 U.S. at 572-74.

Mr. Justice Black concurred in the reversal of the judgment and rendered a separate opinion, in the course of which he stated:

> "It is enough for me here that the press release was neither unauthorized nor plainly beyond the scope of Mr. Barr's official business, but instead related more or less to general matters committed by law to his control and supervision. See *Spaulding* v. *Vilas*, 161 U.S. 483, 493, 498-499." 360 U.S. at 577-78.

There were several dissents in *Barr*, among the reasons for which were: That the press release was not an appropriate exercise of discretion by Barr; that a public statement such as a press release is normally intended for and reaches a larger audience than an internally communicated report; that a press release is communicated to a public in no position to evaluate its accuracy whereas, when communicated internally, the superior is usually in a position to do so; and that giving officials below cabinet or equivalent rank qualified privilege for statements to the public would in no way hamper the executive department of the government, nor would it unduly subordinate the interest of the individual in obtaining redress for the public defamation. A further ground of dissent was that the issuance by the petitioner there was not "action in the line of duty."

In *Howard* v. *Lyons*,[3] defendant [petitioner in the Supreme Court] was a Captain in the Navy and Commander of the Boston Naval Shipyard. While acting as such, he withdrew recognition of the Federal Employees Veterans Association, in which the alleged libelees were officers, and sent an official report of his action to the Chief of the Bureau of Ships and to the Chief of Industrial Relations of the Department of the Navy, reciting his dissatisfaction with the activities of the association. In accordance with the policy and the usual practice of the Navy, he

[3] Decided the same day as was *Barr* v. *Matteo*.

also sent copies of the report to the Massachusetts congressional delegation. Absolute privilege was asserted and upheld by the Supreme Court.

The present case is certainly one falling *a fortiorari* within the holdings of the cases just discussed. Here there was an interview solely brought about as a result of the activities of Wickersham and McNett; no effort was made by the defendant to spread the alleged slander.[4] Also, the statement was made in the course of "matters committed by law to his control or supervision," and "action in the line of duty" in that it was made during the meeting of General Landon, his aide, Mr. Wickersham, and Mr. McNett relating to a matter coming within the responsibilities officially chargeable to the position held by General Landon. There is no question whatever, from the record, but that efforts were made by Wickersham and McNett not only to get Royal Electric back to the position where it could deal with the government, but also to clear plaintiff of the charges against him. Even assuming that the statements complained of were made (which we are obliged to do for the purpose of the motion for summary judgment) and that the suggestion that the investigators should be investigated angered General Landon (a not unnatural reaction), the whole interview had reference to a matter under the jurisdiction of General Landon which was being discussed by the four people present at the meeting.

The plaintiff urges that Judge Matthews "erred by granting summary judgment for defendant after the Court, Judge Youngdahl, had denied *an identical motion* [emphasis supplied] on the ground that genuine issues as to material facts existed. Judge Youngdahl's decision

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[4] It may be noted in passing that although there was, technically speaking, a publication of the slander, the publication to the public was done by plaintiff himself in filing the suit.

was the law of the case and bound Judge Matthews." Plaintiff's argument on this point is unsound. The motion on which summary judgment was granted was not "an identical motion." The record before Judge Matthews, as we have indicated above, contained a great deal more than was before Judge Youngdahl and demonstrated, in our opinion, not only that the action of Judge Matthews in entertaining the motion was proper, but that her action in granting it was also correct. This was not a case of counsel "shopping" for another judge. Nor was it a situation where the rule of comity between judges required Judge Matthews, on a different and expanded record, to make the same ruling which Judge Youngdahl had made.

Holding that the statements made were absolutely privileged, we affirm the judgment of the District Court.

Affirmed

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In the Supreme Court of the United States

OCTOBER TERM 1962

No. 459

RALPH O. BROWNFIELD, PETITIONER

v.

TRUMAN H. LANDON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the district court granting respondent's motion for summary judgment (Pet. App. 1a–2a) are not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 2a–10a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1962 (Pet. App. 2a). The petition for a writ of certiorari was filed on September 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether statements made by the Inspector General of the United States Air Force in conference with a Congressman and an interested private citizen respecting an investigation of improper conduct on the part of an Air Force officer in connection with military procurement were absolutely privileged.

STATEMENT

This action was commenced by petitioner Brownfield, a retired United States Air Force officer, for damages for slander against respondent Landon, who was a lieutenant general serving as Inspector General of the United States Air Force at the time of the alleged defamation. The complaint alleged that respondent Landon "with malice and malicious intent" made false and defamatory oral statements about petitioner to two persons in respondent's office in the Pentagon on or about October 13, 1955. The two persons were Congressman Victor Wickersham, a representative from Oklahoma and a member of the House Armed Services Committee, and Robert E. McNett, head of Royal Electric Company (J.A. 2–4).[1]

1. *Relevant Facts.* In May 1955, the Office of Special Investigations of the Air Force (hereinafter referred to as OSI) initiated an investigation of alleged irregular conduct on the part of command personnel at the Middletown Air Materiel Area, Olmstead Air Force Base, Pennsylvania (J.A. 31). This investigation involved Royal Electric Company of Day-

[1] This reference is to the joint appendix in the Court of Appeals which has been filed in this Court.

ton, Ohio, a Government contractor, of which Robert E. McNett was president, and the company's relations with Air Force personnel, including petitioner Brownfield. At that time, petitioner was a brigadier general on duty at Middletown. Respondent, as Inspector General of the Air Force, was in charge of the OSI (J.A. 7).

In June and July 1955, respondent received reports on the investigation indicating the possibility of improper contract awards to Royal Electric Company based, at least in part, on the offer and acceptance of gratuities by Air Force personnel, and implicating petitioner Brownfield (J.A. 75–97).

On or about August 1, 1955, the case was submitted by the Air Force to the Department of Justice for consideration of criminal action. In response to the request of the Judge Advocate General of the Air Force (J.A. 97–99; 118–122), the Assistant Attorney General in charge of the Criminal Division, Department of Justice, authorized the Air Force to continue the investigation. He further advised the Air Force that the case was being submitted to the United States Attorney in Scranton, Pennsylvania, for determina-

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Respondent reported directly to the Chief of Staff. His duties included, among others, the exercise of staff supervision over and the establishment of standards, policies and procedures relative to inspections and investigations; the providing of policy concerning the security of the Air Force establishment and safeguarding of military information; the conduct of inspections and surveys of Air Force activities; the conduct of investigations of matters involving major crimes, violations of public trust and subversive activities, and of complaints or allegations pertaining to administrative irregularities, or irregular action of personnel (J.A. 20–22).

tion of whether criminal prosecution under bribery and conflict of interest statutes was warranted; and he requested that copies of OSI reports reflecting the results of further inquiries be submitted to the Criminal Division and to the Office of the United States Attorney (J.A. 123–127). Thus, primary investigative jurisdiction of the case continued in OSI until the conclusion of criminal proceedings in the Middle District of Pennsylvania in 1958 (J.A. 100–102; 104–116).

After further investigation by the OSI, and following an administrative reprimand and a recommendation by his superior that petitioner be reduced to his permanent grade of colonel and be transferred from the Air Materiel Command (J.A. 23–25; 101), petitioner reverted to his permanent rank on October 1, 1955 (J.A. 25).

In the interim, McNett, president of Royal Electric Company, had learned of the OSI investigation and contacted Representative Wickersham who knew that Royal and petitioner were charged with irregularities (J.A. 39–40). As a result of a request from Representative Wickersham, acting in his official capacity as a member of Congress and of the House Armed Services Committee, Lieutenant General William D. Eckert, who at that time was Assistant Chief of Staff for Materiel, USAF, with headquarters in the Pentagon, met in his office on October 11, 1955, with Representative Wickersham and McNett (J.A. 14–15; 56). The two visitors discussed the OSI investigation and the manner in which it was conducted, the matter of a patent which petitioner

Brownfield had sold to Royal Electric, and the fact that Royal had apparently been placed on the debarred bidders list by the Air Force (J.A. 15–18; 34–35). At the request of the Congressman and McNett, General Eckert arranged a conference for them with respondent Landon (J.A. 17–18; 45). At the conference, which took place on October 13, 1955, there were present Representative Wickersham, McNett, General Landon, and the General's Executive Officer, Colonel Powel. It was at this meeting that the allegedly slanderous words are said to have been uttered.

Representative Wickersham opened the discussion by commenting on the investigation of Royal Electric Company and criticizing the attitudes and methods of the investigators. He said the investigators should be investigated, and suggested that Congress or one of its committees could perform that task. It was in responding to this observation that respondent Landon is alleged to have slandered petitioner (J.A. 26–28).

General Landon agreed to the conference only because one of the two persons was a Congressman (J.A. 8). The Secretary of the Air Force explained the existing policy governing conferences between officials of the Air Force and members of Congress, concluding that, in the circumstances, "it was incumbent upon General Landon, as Inspector General of the United States Air Force, to confer with Congressman Victor Wickersham and Mr. Robert E. McNett, President of the Royal Electric Company, Inc." (J.A. 13–14).

2. *Proceedings Below.* In his answer to the complaint seeking damages for the alleged slander, respondent Landon admitted conferring with Representative Wickersham and McNett, denied making the alleged statement, pleaded the truth of the statements which he did make, and stated that "any and all actions taken or words spoken in the premises by him were in the course and conduct of his official duties as Inspector General of the United States Air Force and are and were absolutely privileged" (J.A. 5–6).

On November 27, 1959, respondent filed a motion for summary judgment with accompanying affidavits and exhibits (J.A. 6, 7, 13, 14, 18, 19, 23, 25). Petitioner filed an opposition with accompanying affidavits and exhibits (J.A. 26, 29, 30, 31). On June 3, 1960, the motion was denied by District Judge Youngdahl on the ground that there were disputed material facts, "particularly those concerning the circumstances under which the defendant made the alleged defamatory statements" (J.A. 33–34).

After the taking and filing of depositions of the persons involved in the incident (J.A. 34, 48, 50, 72, 73; see also 75, 77, 86, 90, 97), and the filing of further exhibits (J.A. 100, 101, 103, 104, 116), respondent, "on the basis of further discovery since June 3, 1960," again moved for summary judgment, asserting that there now remained no genuine issue of material fact and that respondent was entitled to judgment as a matter of law (J.A. 99). The district court (Matthews, J.) agreed; and on November 21, 1961, entered an order granting respondent's motion for summary judgment (J.A. 127–128).

The Court of Appeals affirmed. It held, *inter alia*, that the "purpose of the conference was to discuss the investigation, the surrounding facts of which were fully known to all parties present"; that "since the investigation involved improprieties alleged to have arisen in connection with certain business transactions between plaintiff and Royal, it is obvious there could have been no discussion of the investigation without reference to plaintiff's activities, the two being inseparably linked"; that on respondent's second motion for summary judgment there were no genuine issues of material fact precluding judgment; that the statements were made in the course of matters committed by law to respondent's control or supervision; and that, under this Court's decisions in *Barr* v. *Matteo*, 360 U.S. 564, and *Howard* v. *Lyons*, 360 U.S. 593, the statements made by respondent were absolutely privileged (Pet. App. 2a–10a).

ARGUMENT

The principles laid down by this Court in *Barr* v. *Matteo*, 360 U.S. 564, are controlling here. Since the case turns entirely upon the application of those principles to the particular facts and circumstances, no question of general importance is presented. Moreover, the decision below is clearly correct. The petition for a writ of certiorari should therefore be denied.

1. In the *Barr* case and in *Howard* v. *Lyons*, 360 U.S. 593, decided the same day, this Court reiterated the rule that acts of public officials, including their public statements, which are related to matters committed to their control or supervision are absolutely

privileged. Notwithstanding petitioner's suggestion to the contrary, there is no justification for re-examining *Barr* and the long line of cases on which it rests. Indeed, in *Barr,* this Court in effect reaffirmed its earlier rulings in *Spalding* v. *Vilas,* 161 U.S. 483, and *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed, 275 U.S. 503, and ratified the decisional law of the lower courts. See *Barr* v. *Matteo,* 360 U.S. at 572 and fn. 9; 3 Davis, *Administrative Law Treatise,* Sec. 26.01 (Pocket part, 1960) ("the law before the Barr decision was overwhelmingly what the majority held it to be in the Barr case * * *").

2. Petitioner suggests that the rule affirmed in *Barr* is, in any event, inapplicable because only acts, and not words, are the proper subject of privilege. The argument is untenable. If accepted, it would nullify the very protection for public officials which absolute privilege is designed to afford. As this Court pointed out in the *Barr* case, the reason for the recognition of privilege is that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571. To say, as petitioner does, that Barr's action in issuing the press release might have been privileged but that the words he used therein were not, is to make a mockery of the doctrine. The same considerations govern whether official conduct consists of acts or

words. And, notwithstanding petitioner's contention to the contrary, this has always been the rule. Absolute privilege has been invoked traditionally by federal courts for the protection of public officials in numerous suits for defamation prior to this Court's decision in *Barr*. See, *e.g.*, *Newbury* v. *Love*, 242 F 2d 372 (C.A.D.C.); *Glass* v. *Ickes*, 117 F. 2d 273 (C. A.D.C.), certiorari denied, 311 U.S 718; *Mellon* v. *Brewer*, 18 F. 2d 168 (C.A.D.C.), certiorari denied, 275 U.S. 530; see also cases cited in *Barr*, 360 U.S. at 572, fn. 9. And, since *Barr*, this Court, in a number of cases not substantially different from the present one, has denied petitions for writs of certiorari. See, *e.g.*, *Poss* v. *Lieberman*, 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; *Meredith* v. *Van Oosterhout*, 286 F. 2d 216 (C.A. 8), certiorari denied, 365 U.S. 835; *Sauber* v. *Gliedman*, 283 F. 2d 941 (C.A. 7), certiorari denied, 366 U.S. 906.

3. Nor is there merit in petitioner's contention that the lower court in this case extended the doctrine beyond the *Barr* decision (Pet. 8). As we read petitioner's argument on this point, he contends that *Barr* is limited to officials of policy-making rank and action in a policy-making capacity; that respondent was not thus acting at the time the alleged defamation took place; and that respondent's action was outside the scope of his official duties. But *Barr* itself made plain (360 U.S. at 572–574), and *Howard* v. *Lyons*, 360 U.S. 593,[3] confirmed, that the privilege does not depend on

[3] In that case, the Court granted absolute privilege to statements made by a captain in the Navy in a report to his superior, a copy of which was also sent to the Massachusetts delegation in Congress in accordance with standard Navy procedure.

the rank of the official. The only pertinent inquiry is whether there exists a reasonable relationship between the action complained of and the officer's duties, mandatory or discretionary. 360 U.S. at 573–574, 575.

Measured by this standard, the Court of Appeals was clearly correct in holding respondent's challenged action absolutely privileged. The Secretary of the Air Force unequivocally stated that "it was incumbent upon General Landon, as Inspector General of the United States Air Force, to confer with Congressman Victor Wickersham and Mr. Robert E. McNett, President of the Royal Electric Company, Inc." (J.A. 13–14). Cf. *Howard* v. *Lyons, supra,* at 597–598, and n. 2. And, as the court below noted, the purpose of the conference was to discuss the investigation of improprieties alleged to have arisen in connection with the business transactions between the petitioner and Royal (Pet. App. 4a), and the discussion necessarily involved reference to petitioner's activities. Patently, petitioner's contention that respondent was not acting within the scope of his official duties when the defamatory statements were allegedly made cannot stand.

4. Finally, petitioner has not, and cannot, show the existence of any genuine issue of material fact to defeat the summary judgment in respondent's favor. While the Middletown case had been referred to the Justice Department prior to the date of the conference on October 13, 1955, the record establishes that investigative authority continued in the Office of Special Investigations under respondent's jurisdiction (J.A. 100; 123–127); and that in fact further

investigation was made, including further interviewing of petitioner (J.A. 31; 101–102). There is no contradiction between the finding of one district judge that the case was not then ripe for summary judgment and the contrary finding of another judge, seventeen months later, on a greatly expanded record. The ultimate conclusion, affirmed by the Court of Appeals, is clearly correct and does not require further review by this Court. See *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RALPH O. BROWNFIELD, *Petitioner*

v.

TRUMAN H. LANDON

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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Issues of Fact Raised by Petitioner

Respondent says, at page 10, "petitioner has not, and cannot, show the existence of any genuine issue of material fact to defeat the summary judgment in respondent's favor."

When the doctrine of *Barr* v. *Matteo*, 360 U.S. 564, is to be applied to any given case, the material fact will always be the scope of the official's duties vis'-à-vis' the person defamed. Attorney General Rogers recognized this in his memorandum to all heads of depart-

ments two weeks after this court announced the *Barr* decision. Petition, page 7-8.

In the instant case the scope of respondent's duties vis'-à-vis' petitioner was put in issue in two postures by the affidavits, depositions and exhibits on file:

1. On the date of the alleged slander did respondent have "control or supervision" over the investigation or the petitioner? (See discussion on page 9 of Petition).

2. Was it within the "outer perimeter" of respondent's line of duty on that date to:

a. Announce a judicial-type opinion as to petitioner's guilt or innocence?

b. Use words, when rendering his opinion, which are slanderous *per se?*

As to item 2, the question of whether an act is within the "outer perimeter" of a person's duties can often be resolved by reference to his "job sheet." In this case the pertinent Air Force Regulation (No. 20-68) was before the lower courts (J.A. 19-23). Neither respondent nor the lower court has indicated, as indeed they cannot, what part (or parts) of the cited regulation form the basis for a contention that the Inspector General could be considered as acting within the "outer perimeter" when he passed judgment in words which are slanderous *per se*. Reference to this line of argument, with citation to Regulation No. 20-68, was made in the Petition at page 8.

Issues of Fact Raised by Respondent

In addition to the issues of material fact already discussed, respondent apparently deems other issues as material.

1. Respondent refers to the "purpose of the conference" (pp. 7 and 10). Respondent's version of the "purpose" is contrary to petitioner's account as set forth in the Petition at page 3. If the "purpose" of that conference is material under the *Barr* doctrine, then there is another issue of material fact in the record.

2. Respondent refers to J.A. 17-18 and 45 and states (p. 5) that "at the request of the Congressman and McNett, General Eckert arranged a conference with respondent Landon." The first reference is to General Eckert's *affidavit*, but General Eckert later testified at his *deposition* that, "I do not recall whether I specifically proposed it or whether they specifically proposed it as a result of the conversation" (J.A. 72). The second reference is to Mr. McNett's deposition and is not supported by the text. In answer to the direct question "And you had requested it; is that right?", he said, "I don't know whether we requested it or he suggested it, but anyway I welcomed it" (J.A. 45). Congressman Wickersham testified at his deposition, "I don't recall myself asking for an appointment with Landon himself" (J.A. 59). If it is material under the *Barr* doctrine to know who originally had the idea for a conference with respondent, then there is another dispute as to a material fact.

3. Respondent refers (p. 5) to the affidavit of the Secretary of the Air Force (J.A. 13-14) in which the Secretary said that "Under the circumstances set forth in the affidavit of" respondent, "it was incumbent upon General Landon, as Inspector General of the United States Air Force, to confer with Congressman Victor Wickersham . . .". Respondent had said in his affidavit (J.A. 8) that Congressman Wickersham

and Mr. McNett "had demanded a meeting with me." Since this statement by respondent has been controverted by the three people who were together when the meeting was arranged, the affidavit of the Secretary (as to what respondent had to do "under the circumstances" described by respondent) has no probative value. If it is material under the *Barr* doctrine to determine whether, "under the circumstances", it was "incumbent upon" respondent to confer with Congressman Wickersham, there is yet another issue as to a material fact.

4. Respondent refers to Congressman Wickersham's affidavit (J.A. 26-28) and says that "Representative Wickersham opened the discussion by commenting on the investigation of Royal Electric Company and criticizing the attitudes and methods of the investigators" (p. 5). While it is true that the Congressman's affidavit supports this statement, yet when he was questioned later by the government's attorney during his deposition, Mr. Wickersham twice said that he opened the discussion by questioning the denial of the right of Royal Electric to bid on Air Force Contracts (J.A. 63, 66). At his deposition, Mr. McNett testified that the criticism of the attitudes and methods of the investigators came near the end of the interview (J.A. 46-47). If the opening statement in the discussion is material under the *Barr* doctrine, then there is still another issue of fact which must be resolved by a trial court.

CONCLUSION

There are now, and have been since the case was in the trial court, genuine issues as to material facts. Petitioner has consistently brought before the courts those issues which he deems material in view of the *Barr* v. *Matteo* doctrine. Respondent, in his brief, has made statements concerning the case which, obviously, he believes are material. As noted above, his statements are disputed.

Since there are genuine issues as to material facts, respondent's motion for summary judgment should have been denied (Rule 56(c), Fed. Rules of Civil Pro.; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627). This court should grant the writ of certiorari to correct what has turned out to be a misuse of the judicial process.

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November 5, 1962